

UNITED STATES DEPARTMENT OF LABOR
BOARD OF ALIEN LABOR CERTIFICATION APPEALS
800 K STREET, N.W., SUITE 400
WASHINGTON, D.C. 20001-8002

'Notice: This is an electronic bench opinion which has not been verified as official'

DATE: January 30, 1997

CASE NO: 95-INA-250

In the Matter of:

SAVE-ON DRUGS

Employer

On behalf of:

DOUGLAS H. JORDON

Alien

Appearance: E. I. Horwitz, Esq., Woodland Hills, CA
for the Employer

Before: Huddleston, Holmes and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of Alien Douglas H. Jordon ("Alien") filed by Employer Save-On Drugs ("Employer") pursuant to Section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1182(a)(5) (A) ("the Act") and the regulations promulgated thereunder, 20 CFR Part 656. The Certifying Officer ("CO") of the U.S. Department of Labor, San Francisco, California, denied the application and the Employer requested review pursuant to 20 CFR § 656.26.

Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General (1) there are not sufficient workers who are able, willing, qualified and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely

affect the wages and working conditions of the U.S. workers similarly employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written argument of the parties. 20 CFR § 656.27(c).

STATEMENT OF THE CASE

On June 23, 1993, Employer filed an application for labor certification to enable the Alien, a national of South Africa, to fill the position of "Pharmacist" at a salary of \$1,160.00 per week. A Bachelor of Science in Pharmacy and a license as a California registered pharmacist was required; no occupational experience was required. The job offered was described as:

Compound and dispense medications. Weighs and mixes drugs and other medical compounds following prescriptions issued by health care professionals. AF 23.

In part B of the application, the Alien indicated that he possessed a Bachelor of Science in Pharmacy from the University of Natal in Durban, South Africa and was licensed as a registered pharmacist in California. The Alien also indicated that he had worked as a Managing Director of South Beach Pharmacy in South Africa beginning in 1991. AF 55, 61, 63.

Two transmittals from the California Employment Development Department indicated that there were two U.S. applicants for the position, both of which came from advertising in the Orange County Register. AF 32, 33. Employer received the resumes of the two applicants and determined that applicant Omer Mohamed was unqualified as he was a graduate intern. In addition, Employer stated that applicant Tuong Nguyen was interviewed for the position, but was found to be unqualified as his communication skills were "extremely poor" and he was unable to comprehend or answer simple questions asked during the interview. Employer concluded that it had made a good faith, but unsuccessful, effort to employ a U.S. worker for the Pharmacist position and that as Mr. Jordan possessed the necessary qualifications labor certification was requested. AF 30, 31.

On July 21, 1994, the CO issued a Notice of Findings in which he notified the Employer of the Department of Labor's intention to deny the application because the requirement that

communication skills are required for the position was not shown on the ETA 750 Part A and thus Employer could not cite this requirement as justification for finding that the U.S. applicant was not qualified. The CO further stated that while Employer said the applicant Nguyen was unable to communicate effectively during the interview, it failed to document the specifics of the interview. In addition, the CO found that as applicant Nguyen's resume shows a B.S. in Pharmacy, a California pharmacy license, several years experience as an pharmacist and the ability to speak English, he possessed the qualifications to perform the duties of the position. AF 20.

The CO required the Employer to demonstrate that applicant Nygyen does not possess the required qualifications for the position and that he is unable to perform the basic duties of the job. AF 20A. Further, the CO found that Employer failed to list the word "alien" on the posted notice for the position, and was advised to post a new notice for ten days including information that the notice was posted as the result of the filing of an application for a permanent alien labor certification for the pharmacist position. AF 20A.

The Employer submitted its rebuttal on August 17, 1994, through a letter from Ellie James, its Pharmacist recruiter (with attachments). AF 16-18. Employer stated that applicant Nguyen was personally interviewed in English on November 17, 1993, and was unable to answer basic questions. Employer stated that the Pharmacist position requires communication skills in receiving written and oral prescriptions from physicians and in describing the use of medication to customers. As a result, Employer stated that because the applicant possessed poor verbal skills during the interview, he was considered unqualified for the position. Employer also submitted an amended copy of the notice of internal posting containing the word "alien" and stated that no applicants responded. AF 17.

The CO issued a Final Determination dated September 12, 1994 in which he rejected Employer's rebuttal regarding the issue of applicant Nygyen's communication skills. The CO stated that he was not persuaded that Employer's rejection of applicant Nguyen was lawful, as the applicant possessed the minimum requirements for the position. The CO found that Employer's examples of questions asked of the applicant during the interview did not establish that he could not perform the basic duties of the job or that he did not possess the minimum requirements of the position. AF 7. In addition, the CO said that applicant Nguyen's resume shows that he has several years as a Pharmacist performing the required duties of the job and that he reads, writes and speaks English, and concluded that Employer's rebuttal did not refute the applicant's qualifications.

The CO concluded that as the Employer failed to establish

that applicant Nguyen did not possess the minimum requirements of the position and could not perform the duties of the job, pursuant to 20 CFR § 656.21(j)(1). Consequently, certification was denied under the Act and regulations.¹ AF 7.

Employer, requested an administrative/judicial review of the CO's Final Determination on October 12, 1994. AF 1-3.

DISCUSSION

Labor certification was denied in the instant case for the following reasons: (1) Employer failed to establish that U.S. applicant Tuong Nguyen was rejected lawfully, as it failed to demonstrate that he did not possess the minimum requirements for the position; and (2) Employer failed to establish that the U.S. worker could not perform the basic duties of the position at the time of initial consideration, in contravention of 20 CFR § 656.21(j)(1).

Under 20 CFR § 656.21(j)(1)(iv), an Employer must explain, with specificity, the lawful job-related reasons for not hiring each U.S. worker interviewed.

In the Final Determination, the CO stated that:

Employer's rebuttal did not offer any new information or documentation that Mr. Nguyen was in fact rejected lawfully. Employer merely reiterated the importance of good communication skills and that the applicant could not answer the simplest of questions. Employer's example of questions asked of the applicant were what are applicant's short term goals and what did applicant consider to be best about himself. We fail to see the relevance of these questions in relation to the NOF corrective action, which was: show that Mr. Nguyen did not possess the minimum requirements of the job, that he was not State registered, and that he was unable to perform the basic duties of the job at the time of initial consideration.

The minimum job requirements described in ETA 750 Form A for the Pharmacist position were a Bachelor of Science in Pharmacy and California registration as a Pharmacist. No direct experience was required. We find Mr. Nguyen possessed these minimum requirements at the time of initial consideration, as his resume indicates that he possesses a Bachelor of Science in Pharmacy from the University of Pharmacy in Vietnam and is

¹The Certifying Officer found in the Final Determination that as Employer reposted the job notice during the period of August 5-17, 1994 and did not receive any responses, the posting issue as described in the Notice of Findings had been satisfied. AF 7.

licensed in California as a registered Pharmacist. AF 42-43.

The Board has held that an applicant is considered qualified for a job if he meets the minimum requirements specified for that job in the labor certification application. **United Parcel Service**, 90-INA-90 (Mar. 28, 1991). An Employer's rejection of a U.S. worker who satisfies the minimum requirements specified on the ETA 750 Form A and in the advertisement for the position is unlawful. **American Cafe**, 90-INA-26 (Jan. 24, 1991). The Employer did not present new information or documentation to prove differently, and did not in its brief dispute that the applicant Nguyen possesses these requirements. As a result, we agree with the CO that applicant Nguyen possessed the stated minimum requirements for the Pharmacist position and that the Employer impermissibly rejected him for the position. **American Cafe**, supra.

In addition, the CO concluded that the Employer failed to demonstrate that applicant Nguyen could not perform the basic duties of the job. Specifically, Employer contends that applicant Nguyen's communication skills were so poor and his inability to speak English so obvious that he was unable to perform the duties of a pharmacist. We agree with the Employer that a Pharmacist must be able to communicate in English to perform the required duties of the position. However, while the rejection of a U.S. applicant because he or she cannot speak English is lawful, **Juanito N. Roque**, 88-INA-4 (Apr. 5, 1988), the burden of proof is on the Employer to document that the applicant is not able to speak English. **Impell Corp.**, 88-INA-298 (May 31, 1989). In the NOF, the Employer was asked to submit documentation establishing that applicant Nguyen could not perform the basic duties of the Pharmacist position. In arguing that applicant Nguyen is unable to communicate well enough in English to perform the duties of a Pharmacist, Employer stated in rebuttal and brief that the applicant was unable to comprehend or answer basic questions asked at his interview and that he could not answer questions regarding his short term goals and what he considered his best qualities. AF 16, 17.

After considering all the evidence of record, including the Employer's statements in rebuttal together with the applicant's education, employment history and time spent in the United States, we agree with the CO that the Employer failed to demonstrate that applicant Nguyen was unable to perform the stated job duties. The record shows Mr. Nguyen has several years of experience as a Pharmacist in the United States. His resume shows he dispensed medication, took phone prescriptions, and counseled customers regarding prescriptions. His resume also shows that in addition to Vietnamese and French, he reads, writes and speaks English. The rebuttal did not refute the education and experience of this applicant at the time of consideration by

the employer. AF 7. Contrary to the Employer's contention, it would not seem possible for applicant Nguyen to have received a California license to dispense medication as a Pharmacist and to have been employed by two pharmacies in California if he was unable to communicate effectively in English. AF 42-43. Moreover, applicant Nguyen's resume shows that he has been in the United States since 1987, which would obviously appear to be sufficient time to develop effective communication and writing skills in English to perform the duties of a Pharmacist. For these reasons, the Employer's documentation that the applicant was unable to perform the duties of the position due to his inability to communicate in English, does not outweigh the evidence that supports a finding that applicant Nguyen is able to communicate, read and write English in performing the duties of a Pharmacist, and that the Employer has failed to carry its burden of proof. **Orient Computer Corporation**, 91-INA-322 (Mar. 18, 1994).

Employer sought to demonstrate that the U.S. worker cannot perform the duties of the position offered as he is unable to communicate effectively in English. The subjective reason for rejecting the U. S. applicant in this case was not per se an unlawful reason for rejection in this case. It is the general rule that an employer's use of a subjective reason for rejecting the U. S. job applicant is objectionable because it failed to document either (1) the way in which the employer arrived at that subjective conclusion and (2) the way in which the subjective reason relates to the job duties or, in the alternative, the impossibility of verification of that subjective reason. **Oscar R. & Barbara Lichtenstein**, 91-INA-390 (Dec. 16, 1992).²

For this reason the burden is on the Employer to demonstrate that the U. S. applicant Nguyen would not be able to perform the duties of a Pharmacist because he cannot speak or write in English. The Employer's proof of this contention consisted of its subjective recollection of the responses of Mr. Nguyen to its questions unrelated to the job during his interview. Considering the length of time that Mr. Nguyen has resided and worked in the United States, Mr. Nguyen's success in becoming registered as a Pharmacist in California, and Mr. Nguyen's employment experience as a Pharmacist in the United States, it is found that Employer has failed to establish that he cannot communicate effectively in English and for this reason that he could not perform the duties

²See also **United Cerebral Palsy of the Inland Empire, Inc.**, 90-INA-527 (Aug. 19, 1992); **Bahman Nourafshan**, 90-INA-095 (Dec. 10, 1991); **Mr. and Mrs. Jeffrey Hines**, 88-INA-510 (Apr. 9, 1990); **Hill-Fister Engineers, Inc.**, 89-INA-114 (Feb. 6, 1990); **Marnic Realty**, 90-INA-048 (Nov. 21, 1990); **Collectors Internatinal, Ltd.**, 89-INA-133 (Dec. 14, 1989); **Sete Consultants and Services**, 89-INA-100 (Nov. 15, 1989); **Lisitrani's Restuarant**, 88-INA-380 (June 9, 1989) (en banc); **Switch, USA, Inc.**, 88-INA-164 (Apr. 19, 1989) (en banc); **R. L. Fender, D.D.S., P.C.**, 87-INA-657 (Feb. 3, 1988); **Southpoint Seafood Market**, 87-INA-614 (Jan. 2, 1988).

of the position Employer has offered.

Since Employer's contention does not outweigh evidence that supports a finding that Mr. Nguyen can and has successfully performed the work of a Pharmacist in the United States and that he meets the minimum requirements for the position, the Employer has failed to meet this burden. Thus it is concluded that the Employer unlawfully rejected the application of this U.S. worker. Consequently, the CO's reasons for denying Employer's application for labor certification are correct and its denial must be affirmed.

ORDER

The Certifying Officer's denial of labor certification is hereby AFFIRMED.

For the Panel:

FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced,

typewritten pages. Upon the granting of the petition the Board may order briefs.

BALCA VOTE SHEET

Case Name: **SAVE-ON DRUGS**
(Douglas H. Jordon)

Case No. : 95-INA-250

PLEASE INITIAL THE APPROPRIATE BOX.

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	:	CONCUR	:	DISSENT	:	COMMENT	:
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Holmes	:	:	:	:	:	:	:
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Huddleston	:	:	:	:	:	:	:
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Thank you,

Judge Neusner

Date: January 7, 1997